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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

INDEPENDENT U.S. TANKER OWNERS COMMITTEE, *et al.*,
Petitioners,

v.

SAMUEL K. SKINNER, SECRETARY OF THE UNITED STATES DEPARTMENT OF TRANSPORTATION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Keystone Shipping Co.,
Sun Transport, Inc.

QUESTIONS PRESENTED

1. Where Congress has sought, by an appropriations limitation, to bar admission to the protected domestic trade of vessels built with construction subsidy under the Merchant Marine Act for the foreign trade—

> is the appropriations limitation to be given its Congressionally intended substantive effect permanently blocking the specified agency action, or is it to be given no effect where the agency rulemaking anticipated the ban by 19 days and the agency is deemed able to achieve the proscribed result without further expenditure?

2. Where, in order to maintain an American merchant fleet in foreign trade, the Merchant Marine Act directs the Maritime Administration to consider the applications of qualified citizens for operating subsidy, and authorizes subsidy calculated to render the ships competitive with foreign competitors—

> (a) in considering the application of vessels committed to the foreign trade to operate domestically, may the Maritime Administrator decline to consider subsidizing the ships in foreign trade on the ground that subsidy so measured would be "exorbitant" and would not "be sound policy"?
>
> (b) may the court of appeals, which discussed only the question of cost, and acknowledged that "One could argue that this cost is the price we should be ready to pay to achieve the explicit congressional objective", nonetheless sustain the result because it is for the agency to award subsidies, not the courts?

PARTIES TO THE PROCEEDING

Petitioners are Independent U.S. Tanker Owners Committee (an unincorporated association); Overseas Shipholding Group, Inc.; American Trading Transportation Company, Inc.; Cove Maritime Companies, Inc.; Falcon Carriers, Inc.; Keystone Shipping Company; and Sun Transport, Inc.* Other parties who appeared as appellees in the proceedings below are: Crest Tankers, Inc.; Trinidad Corporation; Victory Carriers, Inc.; Seatrain Tankers, Inc.; Richmond Tankers, Inc.; and Stuyvesant Tankers Corporation.

The respondents are Samuel K. Skinner, Secretary of Transportation; the U.S. Department of Transportation; the United States of America; the State of Alaska; American Petrofina, Inc.; SPC Shipping, Inc.; and Atlantic Richfield Co.

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* Parents and subsidiaries of petitioners (other than wholly owned subsidiaries) are: American Trading & Production Corp., parent company of American Trading Transportation Company, Inc.; Chas. Kurz & Co., Inc., parent company of Keystone Shipping Company; and Sun Company, Inc., parent company of Marine Investment Co. of Delaware, which in turn is the parent company of Sun Transport, Inc. The other petitioner corporations have no parent companies or non-wholly owned subsidiaries.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT	5
A. Legislative and Judicial Background	5
B. Proceedings Below	8
REASONS FOR GRANTING THE WRIT	9
I. The Appropriations Limitation	10
II. The Merchant Marine Act	15
CONCLUSION	21

TABLE OF AUTHORITIES

Cases Page

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 15
City of Los Angeles v. Adams, 556 F.2d 40 (D.C. Cir. 1977) 14
Independent U.S. Tanker Owners Committee v. Dole, 809 F.2d 847 (D.C. Cir.), *cert. denied*, 484 U.S. 819 (1987) 7
Independent U.S. Tanker Owners Committee v. Lewis, 690 F.2d 908 (D.C. Cir. 1982) 6
Motor Vehicle Manufacturers Assn. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29 (1983) 16, 18, 19
Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717 (1984) 12
Seatrain Shipbuilding Corp. v. Shell Oil Co., 444 U.S. 572 (1980) 6, 15
United States v. Dickerson, 301 U.S. 554 (1940) 14
United States v. Darusmont, 449 U.S .292 (1981) 12
United States v. Sperry Corp., 110 S. Ct. 387 (1989) 12

Statutes

Merchant Marine Act, 1920

§ 27, 46 App. U.S.C. § 883 ..... 6, 15

Merchant Marine Act, 1936

§ 101, 46 App. U.S.C. § 1101 ..... 2, 3, 15, 17
Title V, 46 App. U.S.C. §§ 1151ff 15
§ 506, 46 App. U.S.C. § 1156 ..... 5, 12
Title VI, 46 App. U.S.C. §§ 1171ff 15
§ 601(a), 46 App. U.S.C. § 1171(a) 2, 3, 18, 19
§ 603(b), 46 App. U.S.C. § 1173(b) 2, 4, 17, 18
§ 604, 46 App. U.S.C. § 1174 19
§ 605, 46 App. U.S.C. § 1175 6

Supplemental Appropriations Act, 1987, Pub. L. 100-71, § 505, 101 Stat. 391, 471 (1987) 2, 8, 10, 11
Department of Transportation and Related Agencies Appropriations Act, 1984, Pub. L. 98-78, 97 Stat. 453, 472 (1983) 6

TABLE OF AUTHORITIES—Continued

Page

Department of Commerce and Related Agencies Appropriations Act, 1984, Pub. L. 98-166, 97 Stat. 1071, 1077 (1983) 6-7
Department of Commerce and Related Agencies Appropriations Act, 1985, Pub. L. 98-411, 98 Stat. 1545, 1551 (1984) 7
Dire Emergency Supplemental Appropriations and Transfers, Urgent Supplementals, and Correcting Enrollment Errors Act of 1989, Pub. L. 101-45, 103 Stat. 97 (1989) 13
Energy and Water Development Appropriations Act, 1990, Pub. L. 101-101, 103 Stat. 641 (1989) 13
Department of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. 101-121, 103 Stat. 701 (1989) 13
Treasury, Postal Service and General Government Appropriations Act, 1990, Pub. L. 101-136, 103 Stat. 783 (1989) 13
Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1990, Pub. L. 101-144, 103 Stat. 839 (1989) 14
Military Construction Appropriations Act, 1990, Pub. L. 101-148, 103 Stat. 920 (1989) 14
Rural Development, Agriculture, and Related Agencies Appropriations Act, 1990, Pub. L. 101-161, 103 Stat. 951 (1989) 14
Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1990, Pub. L. 101-162, 103 Stat. 988 (1989) .. 14
Department of Transportation and Related Agencies Appropriations Act, 1990, Pub. L. 101-164, 103 Stat. 1069 (1989) 14
Department of Defense Appropriations Act, 1990, Pub. L. 101-165, 103 Stat. 1112 (1989) 14
Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 1990, Pub. L. 101-166, 103 Stat. 1159 (1989) 14

TABLE OF AUTHORITIES—Continued

Page

Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1990, Pub. L. 101-167, 103 Stat. 1195 (1989) 14

Federal Regulations

46 C.F.R. § 276.3 (1987) 1

Other Authorities

S. Rep. 1721, 74th Cong., 2d Sess. (1936) (to accompany S. 3500) 19

Devins, *Regulation of Government Agencies Through Limitation Riders*, 1987 Duke L. J. 456 13

Maritime Administration, *Alaska North Slope Crude Distribution* (January 12, 1990) 16

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SAMUEL K. SKINNER, SECRETARY OF THE UNITED STATES DEPARTMENT OF TRANSPORTATION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners Independent U.S. Tanker Owners Committee, *et al.*, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is reported at 884 F.2d 587 (D.C. Cir. 1989). The district court's decision (Pet. App. 25a), Civ. Action Nos. 87-1685 & 87-2102, 1988 WL 48522 (D.D.C. Apr. 29, 1988), is not officially reported. The Maritime Administrator's rulemaking (Pet. App. 49a) appears at 52 Fed. Reg. 23522 (June 22, 1987) (final rule), codified at 46 C.F.R. § 276.3 (1987).

JURISDICTION

The opinion of the court of appeals was entered on August 22, 1989. Timely petitions for rehearing and suggestions for rehearing *en banc* were denied on November 2, 1989. Pet. App. 22a and 23a.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant federal statutes involved are § 505, Supplemental Appropriations Act, 1987, Pub. L. 100-71, 101 Stat. 391, 471 (1987), and §§ 101, 601(a), 603(b), Merchant Marine Act, 1936, 46 App. U.S.C. §§ 1101, 1171(a), 1173(b):

1. Supplemental Appropriations Act, 1987, Pub. L. 100-71, § 505, 101 Stat. 471 (1987):

   None of the funds appropriated or made available by this or any other Act or otherwise appropriated or made available to the Secretary of Transportation or the Maritime Administrator for purposes of administering the Merchant Marine Act, 1936, as amended (46 U.S.C. 1101 et seq.), shall be used by the United States Department of Transportation or the United States Maritime Administration to propose, promulgate, or implement any rule or regulation, or, with regard to vessels which repaid subsidy pursuant to the rule promulgated by the Secretary May 3, 1985 and vacated by Order of the U.S. Court of Appeals for the D.C. Circuit January 16, 1987, conduct any adjudicatory or other regulatory proceeding, execute or perform any contract, or participate in any judicial action with respect to the repayment of construction differential subsidy for the permanent release of vessels from the restrictions in section 506 of the Merchant Marine Act, 1936,

as amended: *Provided*, That such funds may be used to the extent such expenditure relates to a rule which conforms to statutory standards hereafter enacted by Congress.

2. Merchant Marine Act, 1936, § 101, 46 App. U.S.C. § 1101 (Supp. V 1987):

   It is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a merchant marine (a) sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce of the United States and to provide shipping service essential for maintaining the flow of such domestic and foreign water-borne commerce at all times, (b) capable of serving as a naval and military auxiliary in time of war or national emergency, (c) owned and operated under the United States flag by citizens of the United States, insofar as may be practicable, (d) composed of the best-equipped, safest, and most suitable types of vessels, constructed in the United States and manned with a trained and efficient citizen personnel, and (e) supplemented by efficient facilities for shipbuilding and ship repair. It is declared to be the policy of the United States to foster the development and encourage the maintenance of such a merchant marine.

3. Merchant Marine Act, 1936, § 601(a), 46 App. U.S.C. § 1171(a) (Supp. V 1987):

   The Secretary of Transportation is authorized and directed to consider the application of any citizen of the United States for financial aid in the operation of a vessel or vessels, which are to be used in an essential service in the foreign commerce of the United States or in such service and in cruises authorized under section 1183 of this title. In this subchapter VI the term "essential service" means the operation of a vessel on a

service, route, or line described in section 1121(a) of this Appendix or in bulk cargo carrying service described in section 1121(b) of this Appendix. No such application shall be approved by the Secretary of Transportation unless he determines that (1) the operation of such vessel or vessels in an essential service is required to meet foreign-flag competition and to promote the foreign commerce of the United States except to the extent such vessels are to be operated on cruises authorized under section 1183 of this Appendix, and that such vessel or vessels were built in the United States, or have been documented under the laws of the United States not later than February 1, 1928, or actually ordered and under construction for the account of citizens of the United States prior to such date; (2) the applicant owns, or leases or can and will build or purchase, or lease, a vessel or vessels of the size, type, speed, and number, and with the proper equipment required to enable him to operate in an essential service, in such manner as may be necessary to meet competitive conditions, and to promote foreign commerce; (3) the applicant possesses the ability, experience, financial resources, and other qualifications necessary to enable him to conduct the proposed operations of the vessel or vessels as to meet competitive conditions and promote foreign commerce; (4) the granting of the aid applied for is necessary to place the proposed operations of the vessel or vessels on a parity with those of foreign competitors, and is reasonably calculated to carry out effectively the purposes and policy of this chapter. . . .

4. Merchant Marine Act, 1936, § 603(b), 46 App. U.S.C. § 1173(b) (Supp. V 1987):

Such contract shall provide, except as the parties should agree upon a lesser amount, that the amount of the operating-differential subsidy for the operation of vessels in an essential service

shall equal the excess of the subsidizable wage costs of the United States officers and crews, the fair and reasonable cost of insurance, subsistence of officers and crews on passenger vessels, as defined in section 1183 of this Appendix, maintenance, and repairs not compensated by insurance, incurred in the operation under United States registry of the vessel or vessels covered by the contract, over the estimated fair and reasonable cost of the same items of expense (after deducting therefrom any estimated increase in such items necessitated by features incorporated pursuant to the provisions of section 1151(b) of this Appendix) if such vessel or vessels were operated under the registry of a foreign country whose vessels are substantial competitors of the vessel or vessels covered by the contract: *Provided, however*, That the Secretary of Transportation may, with respect to any vessel in an essential bulk cargo carrying service as described in section 1121(b) of this Appendix, pay, in lieu of the operating-differential subsidy provided by this subsection (b), such sums as he shall determine to be necessary to make the cost of operating such vessel competitive with the cost of operating similar vessels under the registry of a foreign country. . . .

STATEMENT

A. *Legislative and Judicial Background*

In the Merchant Marine Act, 1936, 46 App. U.S.C. §§ 1101 *et seq.*, Congress authorized the Secretary of Transportation to provide construction and operating subsidies to assist American vessels to compete in foreign trade on terms of equal cost. Under the statutory scheme, owners of such subsidized vessels bind themselves contractually to operate exclusively in foreign trade, with narrow exceptions for limited operation in the protected domestic trade. 46 App. U.S.C. §§ 1156,

1175(a). The domestic trading restrictions serve the dual purposes of maintaining the presence of American vessels in the foreign trade while protecting the unsubsidized domestic fleet from displacement by subsidized vessels. No subsidy assistance is provided for the domestic trade, as § 27 of the Merchant Marine Act, 1920, 46 App. U.S.C. § 883, has long excluded foreign vessels from that trade.

For over a decade, the courts and Congress have struggled with the authority and standards under which the Secretary may accept repayment of construction-differential subsidy ("CDS") in exchange for permanent rescission of the vessel's domestic trading restrictions. No part of the Act directly addresses this issue. In *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 588 (1980), this Court held that "the Secretary's broad contracting powers and discretion to administer the Act" allow him to rescind the restrictions in appropriate cases upon repayment of the construction subsidy with interest.

The Maritime Administration thereupon issued a general rule establishing eligibility requirements for full CDS repayment, including a showing of specified "exceptional circumstances". Petitioner challenged the laxity of the standards, and in *Independent U.S. Tanker Owners Committee v. Lewis*, 690 F.2d 908 (D.C. Cir. 1982), the court of appeals vacated the 1980 rule and the first application granted thereunder, finding numerous substantive and procedural deficiencies.

In 1983 the Secretary then proposed a new rule, which would allow *any* subsidized vessel to make full CDS repayment during a one-year period. At this point, Congress stepped in to block further agency action. On three separate occasions Congress enacted appropriations riders to prevent the Secretary from adopting such a rule.[1]

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[1] Department of Transportation and Related Agencies Appropriations Act, Pub. L. 98-78, 97 Stat. 453, 472 (1983); Department of Commerce and Related Agencies Appropriations Act, Pub. L. 98-166,

The moment the last bar lapsed, however, the Secretary published the proposed rule in final form. Pursuant to this 1985 rule, the owners of three vessels repaid subsidy and received contract amendments rescinding the domestic trading restrictions.

Once again, the court of appeals vacated the agency's rule on the ground that it failed to reconcile proffered nonstatutory goals of promoting efficiency and competition with the express purposes of the Act. *Independent U.S. Tanker Owners Committee v. Dole*, 809 F.2d 847 (D.C. Cir.), *cert. denied*, 484 U.S. 819 (1987). The court stayed its mandate, however, for six months, until July 16, 1987, to permit the Secretary to undertake further proceedings.

Immediately thereafter, both Congress and the Maritime Administrator again confronted the issue of permanent CDS repayment. On March 11, 1987, the agency announced its intention to publish a new rule confirming the results of the 1985 rule, which had been to admit three vessels. Two weeks later, on March 25, the House Appropriations Committee reported H.R. 1827, a supplemental appropriations bill including the limitation at issue in this case, providing that no funds appropriated "by this or any other Act" may be used "to propose, promulgate, or implement" any rule regarding CDS repayment by any vessel, specifically including the same three vessels, until such time as Congress enacts statutory standards governing such repayment.

On April 15, 1987, the agency published its notice of proposed rulemaking. The House passed H.R. 1827, including the ban on CDS repayment, on April 23; the Senate version of the bill, which did not contain this

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97 Stat. 1071, 1077 (1983); Department of Commerce and Related Agencies Appropriations Act, Pub. L. 98-411, 98 Stat. 1545, 1551 (1984).

provision, passed on June 2. On June 22, while H.R. 1827 was before the conference committee, the agency published its proposed rule, purporting to make it effective immediately. Five days later, on June 27, the conference committee reported out H.R. 1827, with the CDS repayment ban included intact as § 505 of the bill. The conference bill was passed promptly by both Houses, and signed into law on July 11. Supplemental Appropriations Act, 1987, Pub. L. No. 100-71, § 505, 101 Stat. 391, 471 (1987).

B. *Proceedings Below*

Petitioners filed suit challenging the 1987 rule, basing jurisdiction under 28 U.S.C. §§ 1331, 1333, 1337, 1651, 2201-2202. On April 29, 1988, the district court granted their motions for summary judgment. The district court held, *inter alia*, that the rule was barred by Congress' appropriations limitation, § 505, and, in addition, that the rulemaking was arbitrary and capricious because the agency had failed to explain how the rule furthered the goals of the Act. Pet. App. 25a.

The court of appeals (Pet. App. 1a) reversed the district court. With regard to § 505, the panel held that the literal language of the statute addressed future expenditures only and therefore did not void a rule adopted 19 days before enactment. The panel further concluded that no further agency action was required to implement the 1987 rule, and therefore § 505 did not affect the status of the three vessels named in the 1987 rule and specifically referred to in § 505. The statement of the rule's basis and purpose was also found to be sufficient.

REASONS FOR GRANTING THE WRIT

This case presents important issues involving the responsibility of executive agencies and the courts to obey the will of Congress. For some time, Congress had—by appropriations legislation—prevented the Secretary of Transportation from allowing tanker vessels built for the foreign trade with construction-differential subsidy ("CDS") to repay the subsidy and enter the severely overtonnaged domestic oil trade. In 1987—again by appropriations legislation—Congress permanently barred such a rule, specifically designating as to be excluded from domestic trade the specific vessels the pending rule proposed to admit. However, the agency, knowing that the ban was coming, promulgated its rule, made it effective upon publication, and, after enactment of the ban, contended that the ban was ineffective because the rule was earlier in time and required no further expenditure to implement. Overruling the district court, the court below sustained this contention on the ground that "Restrictions on expenditures of appropriated funds are inherently prospective, and we have no authority to give them retroactive effect." Pet. App. 20a.

The issue is important because Congress is often faced with rapid developments to which it considers it can best respond through appropriations limitations.[2] In all such cases its substantive intention is to arrest the action of the agency, and the expenditure limitation is essentially formal. Here, Congress' intent was plainly to halt what it found to be an unwise policy decision of the Maritime Administrator. The court's concentration on the literal form of limitation ignores the statute's plain meaning and frustrates its dominant intent.

The case also presents an issue as to the agency's obligation not to substitute its own notions of "sound

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[2] As shown below, this mechanism, which dates back a century, has become a significant Congressional tool; in 1989, 173 such riders were adopted.

policy" for the express policies and goals of Congress embodied in the organic maritime statute. A major issue in the proceeding was whether the well-being of the merchant marine would be best served by turning the ships in question into the domestic trade with admittedly deleterious consequences or to help maintain them in foreign trade by granting them operating subsidy. The Merchant Marine Act expressly commands the Secretary to consider applications for such subsidy from qualified operators. Yet the agency allowed the tankers to abandon the foreign trade and enter the domestic market, declining the option of granting them operating subsidy to compete effectively in the trade for which they were built, on the grounds of alleged expense and "sound policy." The court below, while acknowledging the argument that "this cost is the price we should be ready to pay to achieve the explicit congressional objective . . ." Pet. App. 13a, again overruled the contrary conclusion of the district court, saying that the Secretary, and not the courts, "has been vested with the authority to determine when operational subsidies should be provided. . . ." Pet. App. 14a.

The issue is important (a) because agencies may not substitute their ideas of good policy for those of Congress, and (b) because courts should not sanction such substitutions on the ground that they do not make policy decisions: that, of course, is a truism, but courts are required to assure that the agencies give reasons for their policy decisions that are consonant with the statutes they are charged to enforce.

I. The Appropriations Limitation

Congress enacted § 505 to block any transfer of tonnage to domestic trade by agency rule, or otherwise, until it could settle proper standards in further legislation. It expressly extended this prohibition to the three ships that had been admitted under the invalidated 1985 rule,

and which it was aware would remain under the proposed 1987 rule.[3]

The blocking law was passed in the form of a limitation on the use of funds appropriated "by this or any other Act or otherwise appropriated or made available". The district court (Richey, J.) vacated the rule because "The agency's action was nothing more than an attempt to subvert the will of Congress, and thus, cannot stand." Pet. App. 29a.

The court of appeals reversed the district court precisely on the ground of the literal form of the act as a limitation on expenditure.[4] Since the agency had raced to utter the rule some days before the spending ban,[5] and thereby arguably finished spending,[6] the court held

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[3] ". . . or, with regard to vessels which repaid subsidy pursuant to the rule promulgated by the Secretary May 3, 1985 and vacated by Order of the United States Court of Appeals for the District of Columbia Circuit January 16, 1987, conduct any adjudicatory or other regulatory proceeding, execute or perform any contract, or participate in any judicial action with respect to the repayment of construction differential subsidy for the permanent release of vessels from the restrictions in § 506 of the Merchant Marine Act, 1936, as amended . . ." § 505, Pub. L. 100-71.

[4] "Although it refers to the ITOC II decision, section 505 applies to any CDS repayment arrangement, and it operates exclusively as a restriction on the *expenditure* of appropriated funds. Such a prohibition is inherently prospective as the language does not purport to reach expenditures already made. Moreover, the provision that no funds *'shall be'* used for the enumerated purposes speaks only to future expenditures." Pet. App. 19a.

[5] The court below noted that, "however unseemly a race to preempt congressional action may at times appear, we know of no principle that holds that the executive branch must stay its hand whenever it learns that the legislative branch may change the law." Pet. App. 16a. The question is not whether the agency should wait, but whether its actions should stand after Congress does in fact "change the law" and invalidates them.

[6] The conclusion of the court below that no further agency expenditure was needed to implement the rule is dubious. Section 505

it free of the statute. "Restrictions on expenditures of appropriated funds are inherently prospective, and we have no authority to give them retroactive effect." Pet. App. 20a.[7]

This literalism was deemed appropriate because of "Congress' decision to rely on the appropriations process to achieve its policy objectives." Pet. App. 20a. So strictly binding on Congress did the court consider the appropriations form that it declined to examine the legislative

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forbids the agency to "execute or perform any contract" affecting the vessels admitted under the previously invalidated 1985 rule. The statutory trading restrictions on subsidized vessels are contractual, as required by § 506, 46 App. U.S.C. § 1156. Their release is likewise matter of contract. In effectuating the 1985 rule, the agency executed amendments to the contracts of the vessels admitted that expressly recited the rule. When the rule was vacated by the court of appeals, the amendments were necessarily voided. New amendments implementing the 1987 rule had not been executed, nor could they now be.

[7] So far as the court's determination that section 505 had only future application may have rested on concerns respecting retroactivity, see Pet. App. 18a, 20a, this Court's decision in *United States v. Sperry Corp.*, 110 S. Ct. 387 (1989), is dispositive. Even if the reason for Congress' having been outraced by the agency did not fall within *United States v. Darusmont*, 449 U.S. 292, 296-297 (1981), and *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 731 (1984) ["short and limited periods required by the practicalities of producing national legislation"], cited in *Sperry*, 110 S. Ct. at 396, retroactive enactments are valid if rationally justified. *Id.* The same reason that prevailed in *Sperry* is fully applicable here: the three ships have been admitted into the domestic trade under standards certain to have been different from those that Congress may hereafter enact; they were allowed in of their own motion and upon mere repayment, and it is more than likely that any future statutory rule will lay down barriers more protective of the coastwise and foreign trades; otherwise Congress would not have disapproved the Secretary's previous rule or the Administrator's present rule. The owners of these ships will therefore have obtained a windfall of the same kind discerned by the Court in *Sperry*, and against which it held that "It is surely proper for Congress to legislate retrospectively". 110 S. Ct. at 396.

history to verify that in enacting § 505, Congress intended "to prevent MarAd from adopting the 1987 rule." To accomplish that result, not appropriations language but authorization language was deemed required: "Had the conferees wished to vacate the 1987 rule, they could have done so simply by ordering its revocation. As they did not, our task is to apply the language they agreed upon and that Congress enacted into law." Pet. App. 21a.

The issue is therefore whether courts and executive agencies must give effect to Congress' substantive policy choices expressed in appropriations legislation. For the problem is present in every appropriations rider. It is obvious that the substantive intention will always be to arrest the agency action and that the spending limitation is essentially formal.

Appropriations-based restrictions on agency action are often the only effective way to prevent the initiation of policies disapproved by Congress, especially when, as demonstrated in this case, there may simply be no time to enact substantive legislation. *See* Devins, *Regulation of Government Agencies Through Limitation Riders*, 1987 Duke L.J. 456, 461-65.

Congress has used limitation riders to enact substantive policy for over one hundred years, and with increasing frequency since the 1960s, Devins, *supra*, at 462-63 and nn. 34-35; in 1989, Congress adopted 173 such riders.[8]

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[8] Dire Emergency Supplemental Appropriations and Transfers, Urgent Supplementals, and Correcting Enrollment Errors Act of 1989, Pub. L. 101-45, §§ 501, 105, 301, 103 Stat. 97, 103, 121-23 (1989); Energy and Water Development Appropriations Act, 1990, Pub. L. 101-101, §§ 502, 505-507, 103 Stat. 641, 656, 666 (1989); Department of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. 101-121, §§ 109-114, 116, 302-304, 306-307, 311, 313, 103 Stat. 701, 720-22, 725-26, 731, 739, 741-43 (1989); Treasury, Postal Service and General Government Appropriations Act, 1990, Pub. L. 101-136, §§ 102, 23-24, 502-503, 505A, 506-514, 520, 528-529, 606, 608, 610-613, 618, 620-622, 103 Stat. 783, 789, 808, 811-22

However awkward they may sometimes seem for accomplishing Congressional policy objectives, such riders constitute duly enacted legislation: "There can be no doubt that Congress could suspend or repeal the authorization . . . and it could accomplish its purpose by an amendment to an appropriation bill, or otherwise." *United States v. Dickerson*, 310 U.S. 554, 555 (1940). As the court of appeals itself has recognized, a court is "bound to follow Congress' last word on the matter even in an appropriations law." *City of Los Angeles v. Adams*, 556 F.2d 40, 49 (D.C. Cir. 1977).

What this means is that although such laws take the form of merely prohibiting expenditure for given agency conduct, courts must recognize that the substantive intention is to block the conduct, and that the expenditure device must not be read so literally as to defeat the real Congressional intention.

(1989); Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1990, Pub. L. 101-144, §§ 505-508, 510, 512-514, 519, 103 Stat. 839, 843, 869-74 (1989); Military Construction Appropriations Act, 1990, Pub. L. 101-148, §§ 101, 107-113, 120, 124, 126, 103 Stat. 920, 923-26 (1989); Rural Development, Agriculture, and Related Agencies Appropriations Act, 1990, Pub. L. 101-161, §§ 617-618, 624, 626, 630-635, 639, 103 Stat. 951, 983-86 (1989); Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1990, Pub. L. 101-162, §§ 103, 105, 205-206, 601, 606, 608, 610, 103 Stat. 988, 994, 1005, 1031-38 (1989); Department of Transportation and Related Agencies Appropriations Act, 1990, Pub. L. 101-164, §§ 306, 308, 313, 315-316, 318, 103 Stat. 1069, 1092-94 (1989); Department of Defense Appropriations Act, 1990, Pub. L. 101-165, §§ 9001, 9006, 9009, 9013-9016, 9020-9023, 9026-9029, 9036-9037, 9039, 9041, 9051, 9054-9055, 9067-9069, 9071, 9073, 9076, 9078, 9080-9081, 9090, 9092, 9116-9117, 103 Stat. 1112, 1129-57 (1989); Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 1990, Pub. L. 101-166, §§ 102-104, 201-202, 204, 209, 214-215, 301, 303-306, 506, 509, 516, 519-520, 103 Stat. 1159, 1165-92 (1989); Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1990, Pub. L. 101-167, §§ 503, 506, 510-511, 513, 519-520, 525-526, 535, 537, 541-542, 546-548, 558, 103 Stat. 1195, 1217-38 (1989).

The court below ignored the plain intention of § 505 to arrest, pending study, the transfer of tonnage from foreign to domestic trade, specifically including the three vessels earlier admitted under an invalid rule, thereby nullifying its dominating objective.[9] The court's nullification of this dominating objective is especially inappropriate when, as here, abundant evidence exists that "Congress has directly spoken to the precise question at issue." *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). In such situations, "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.*

II. The Merchant Marine Act

The Merchant Marine Act, 1936, declares the policy of the United States to foster the development and encourage the maintenance of a merchant marine sufficient to carry the nation's domestic waterborne commerce and a substantial portion of its waterborne foreign commerce. Section 101, 46 App. U.S.C. § 1101; *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572 (1980). The instruments provided for effectuating this policy are the cabotage laws for the domestic trade, § 27, Merchant Marine Act, 1920, 46 App. U.S.C. § 883, and construction and operating subsidies for the foreign trade, Titles V, VI, Merchant Marine Act, 1936, as amended, 46 App. U.S.C. §§ 1151 ff., 1171 ff.

In deciding whether to authorize entry into domestic trade of ships originally built with government subsidy

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[9] The court below speculated that "section 505 could well have been intended to guard against the possibility that the Department might change its mind and enter into repayment arrangements with additional CDS vessels." Pet. App. 19a-20a.

Congress undoubtedly aimed to preclude any form of repayment; but equally without doubt its particular objective was to strike down the rule the Administrator had actually proposed, which was limited to revalidating the ships that had repaid under the vacated 1985 rule.

for the foreign trade, the agency charged with administering these acts was required to consider the interests of both trades and to elect any alternative disposition less disturbing to them. *Compare Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 46-49 (1983). It was conceded that the proposal for domestic transfer would result in severe displacement of important operating tanker tonnage. The agency's conclusory statement was six ships, Pet. App. 61a, but its actual supporting figures in its Regulatory Impact Analysis showed twenty, amounting to almost one million deadweight tons. J.A. 1113, Table VI-1.[10]

More drastic, the government conceded below that, on the prices for domestic shipping that the agency predicted would result from the rule, the remaining fleet would suffer lost freights of $200 million a year, J.A. 1122, and the rate structure would be noncompensatory for every class of tonnage. Federal Motion for Summary Judgment in the District Court, page 7 note 7.[11]

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[10] This prediction, that the subsidized VLCCs would displace nearly 1.0 million dwt of ships ranging from 128,000 dwt down to the class below 55,000 dwt, has been borne out; but in addition, one ship of 188,000 dwt (B.T. ALASKA) and two ships each of 225,000 dwt (the BROOKLYN, one of the ships newly admitted under the rule, and the STUYVESANT, which has defaulted on its mortgage payments and been repossessed by the government) have been forced out. The total tonnage displaced is about 1.6 million dwt. The nonproprietary coastwise fleet, the relevant market, was estimated at 2.7 million dwt when the rule issued. J.A. 709-710.

[11] The three ships admitted under the rule were said by the agency to be suitable only for the long haul from Valdez to Panama, where Alaskan crude oil is transshipped for Gulf and Atlantic destinations. The agency greatly overestimated the amount of oil moving across Panama. It predicted 632,000 barrels a day for 1987; 585,000 for 1988; and 605,000 for 1989. J.A. 1129. Actual movements were respectively 579,000, 427,000 and 290,000 (adjusted to eliminate foreign-flag carryings). Maritime Administration, Alaska North Slope Crude Distribution (January 12, 1990). The difference in the 1989 figures, for instance, means a reduction in shipping demand of 1.5 million dwt for the Valdez-Panama leg, and of 2.1 million dwt

On the other hand, drawing these ships into the domestic trade further reduces the exiguous American tanker fleet engaged in the foreign trade, in which flag participation is far below the statutory standard of "a substantial part of the foreign commerce of the United States". Section 101, *supra.*

These consequences required the agency to consider reasonable alternatives to a rule that at once drains the foreign trade and inflicts severe overtonnaging upon the domestic trade. Such an alternative is found in § 603(b), 46 App. U.S.C. § 1173(b), which authorizes payment of operating subsidy for bulk carriers sufficient to render them competitive with vessels of foreign flag.[12] The ships in question were built with construction subsidy but have never received operating subsidy. Their difficulties in the foreign trade flowed directly from the condition that underlies the statutory subsidy policy, that their operating costs as American ships are too high to permit successful competition in the world market, especially in the acute shipping depression in which that market has struggled for a number of years, Pet. App. 42a, and from which it is only now beginning to emerge.

The whole problem before the agency would be obviated if it followed the explicit statutory plan. Given equalizing subsidy, the ships would remain in the foreign trade for which they were and are necessary and for which they were built, and the destructive consequences

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for the through movement from Valdez to the U.S. Gulf—the latter representing a drop in demand from 4.0 million dwt down to 1.9 million dwt.

[12] "That the Secretary of Transportation may, with respect to any vessel in an essential bulk cargo carrying service as described in section 1121(b) of this Appendix, pay, in lieu of the operating-differential subsidy provided by this subsection (b), such sums as he shall determine to be necessary to make the cost of operating such vessel competitive with the cost of operating similar vessels under the registry of a foreign country."

to the coastwise fleet of their displacement into the domestic trade would be avoided.

It is striking that the statute is mandatory. It *directs* the agency to consider applications for operating subsidy by qualified citizens. Section 601(a), 46 App. U.S.C. § 1171(a).[13] Here the agency declined to do so.

The Administrator gave these reasons for rejecting this alternative: the subsidy would be "exorbitant"; it would lead to "inefficient operation" with the United States underwriting profitability; and "such a massive open-ended subsidy could prove totally counterproductive" for the government's efforts to "remove other anticompetitive trade measures by our trading partners. The United States is neither required to make such expenditures nor would it be sound policy." Pet. App. 76a.

The agency's dismissal in a single paragraph of this outstandingly important statutory alternative is a compendium of factors "Congress has not intended it to consider". *State Farm*, 463 U.S. at 43.

The essence of the Act is to enable inherently high-cost American shipping to meet foreign competition by equalizing construction and operating costs. Section 603(b) authorizes payment of sums to make the operating costs of bulk-carrying vessels fully competitive with their foreign competitors.

The Administrator characterizes this as a "massive open-ended subsidy" and as "underwriting profitability" of "inefficient operation". Pet. App. 76a. Nothing justifies such a description: the statute contingently allows subsidy for costs in respect of which Americans may be

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[13] "The Secretary of Transportation is authorized and directed to consider the application of any citizen of the United States for financial aid in the operation of a vessel or vessels, which are to be used in an essential service in the foreign commerce of the Unted States . . . ."

at a disadvantage, but does not guarantee profitability.[14] But even if they were open to such criticisms, the Administrator cannot simply declare himself not bound "to make such expenditures nor would it be sound policy." Here the Administrator has announced his philosophical disagreement with the law he is charged to enforce. His reference to the "counterproductive" effect of shipping subsidies upon international trade relations, in which he has no statutory responsibility, is especially revealing. The specific purpose of operating subsidy is to compete with foreign shipping: according to § 601, it is not to be awarded unless it will do just that.[15] That it will do so can hardly therefore be a lawful reason for withholding it. In fact, far from withholding subsidy in order to induce foreign countries to do the same, § 604, 46 App. U.S.C. § 1174, authorizes additional subsidy to offset foreign subventions.

In *State Farm*, this Court said, 463 U.S. at 43: "Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider . . . ." The dissenting opinion remarked that different administrations are entitled to reevaluate costs and benefits of programs and regulations, but "Of course, a new administration may not refuse

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[14] Indeed, Congress saw in the differential-subsidy system just the opposite: "It is the purpose of this bill to endeavor to place the American owner and operator of an American flag ship on a competitive parity with his foreign-flag competitor. 'Parity' carries with it no guarantee of profits, and if there are to be any profits, they must be made in competition with foreign shipping." S. Rep. 1721, 74th Cong., 2d Sess. (to accompany S. 3500) (1936) p. 7.

[15] Before approving an application, the Secretary must determine that the operation of the vessel "is required to meet foreign-flag competition"; that the vessels are suitable "to meet competitive conditions"; that the applicant possesses the qualifications "to meet competitive conditions"; and that "the granting of the aid applied for is necessary to place the proposed operations of the vessel or vessels on a parity with those of foreign competitors". § 601(a), 46 App. U.S.C. § 1171(a).

to enforce laws of which it does not approve, or to ignore statutory standards in carrying out its regulatory functions." 463 U.S. at 59 and note. That is what the Administrator has done here. It is a matter of record that no contract for construction or operating subsidy has been awarded since 1981. J.A. 700-01. That record is explained by the Administrator's statement here that subsidies cost too much and are not "sound policy".

The court of appeals discussed only the Administrator's assertion that it would cost too much to subsidize the three ships ($5 million a year for each). Itself remarking skeptically that "One could argue that this cost is the price we should be ready to pay to achieve the explicit congressional objective", the court fell back on the observation that the agency is vested with the authority to decide when to give subsidies, not the courts.

This misconceives the issue: it is not whether the agency has the authority to say no, but whether the reasons it gives for saying no are compatible with the statute it administers. The courts surely have power to make that judgment without feeling that they are being called upon to award subsidies. It is surely within their province to say that the Administrator's philosophical disapproval of the Merchant Marine Act is not a valid basis for refusing to carry it out.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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